Supreme Court, U. S.
FILED
AUG 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-1413

* * *

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare;
MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare,

Petitioners

V.

LOUISE BOND, individually and on behalf of her minor children;
ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association;
SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION, an unincorporated association;
NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Respondents

* * *

BRIEF OF AMICUS CURIAE, THE STATE OF TEXAS

* * *

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BRIEF OF AMICUS CURIAE, THE STATE OF TEXAS

* * *

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) has been reported as *Bond v. Stanton*, 528 F.2d 688 (7th Cir. 1976), and a copy of it is appended to the Petition for

Writ of Certiorari at page A-1. The Order of the United States District Court for the Northern District of Indiana in *Bond v. Stanton* is appended to the Petition for Writ of Certiorari at page A-8.

In addition, Orders of the Seventh Circuit dated June 3, 1975, and February 19, 1976, denying applications for attorneys' fees have been appended to the Petition for Writ of Certiorari at pages A-11 and A-13, respectively.

JURISDICTION

The jurisdictional statement in the Petition for Writ of Certiorari is proper and is incorporated herein.

In addition, the State of Texas files this Amicus Curiae Brief in support of Petitioners because of the serious nature of the issues presented for review and a vital interest in them.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions for consideration herein are the Eleventh Amendment to the Constitution of the United States and Title 42 U.S.C. §1983. The text of both are found in the Petition for Writ of Certiorari.

QUESTION PRESENTED FOR REVIEW

Whether there is a bar to the award of attorneys' fees in an action commenced under 42 U.S.C. §1983 and the award is made against officials of the State of Indiana in their official capacities.

STATEMENT OF THE CASE

The statement of the case is fully and properly set out in the Petition for Writ of Certiorari beginning at page 3.

ARGUMENT

The real issue to be decided here is whether an award of attorneys' fees, in §1983 litigation, against state officers, acting in their official capacities, will be allowed to stand. The resolution of that issue is of monumental importance. A decision adverse to Petitioners would have to be viewed as further and perhaps even total diminution of the Eleventh Amendment to the United States Constitution.

Very simply put, the recovery of monies from a sovereign state, with a total absence of statutory or constitutional authorization, either by way of damages or attorneys' fees, is constitutionally impermissible. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973).

Moreover, the Petitioners in this cause, the Administrator of the Indiana State Department of Public Welfare and the Board Members of the State Board of Public Welfare, are immune from having a judgment for attorneys' fees entered against them. *Edelman v. Jordan, supra* at 664, 665, 675 and 676. The Court observed in *Edelman* at page 664, citing *Ford Motor Company v. Department of Treasury*, 323 U.S. 459 (1945):

> "[W]hen the act is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."

There can be no doubt as to applicability of the *Ford Motor Company* rationale in a suit such as this where Petitioners were sued and an award made against them in their official capacities. The State of Indiana is the

real party of interest.

Furthermore, this Court's recent opinion in *Fitzpatrick v. Bitzer*, 96 S.Ct 2666(1976) makes it clear that an award of attorneys' fees against a sovereign state is only permissible if there is "express congressional authority" for such an award. In relating the basis for the decision in *Bitzer*, the Court said;

> "When Congress acts pursuant to §5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of the constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against states, or state officials which are constitutionally impermissible in other contexts. See *Edelman v. Jordan, supra; Ford Motor Co. v. Dept. of Treasury, supra.*" Id. at 2671.

This litigation was brought under 42 U.S.C. §1983, and clearly, there is no Congressional authorization for departure from the mandatory language of the Eleventh Amendment. The State of Indiana is entitled to invoke its Eleventh Amendment immunity.

The Eleventh Amendment prohibition to the award discussed above is absolute and extends to the situation where "bad faith" is attributable to the state. Such a course must be followed where the action complained of is, as in this litigation, clearly state action. If not, legislative bodies of all fifty states now must face the added burden of monetary liability for even the most

insignificant statutory provision based on the very tenuous and undefinable standard of the motive behind passage. How is one to determine the rationale behind passage of such legislation? Such a development will certainly mark a new era in jurisprudence and will likely cause great strain in the delicate relationship known as federalism.

Finally, awards of attorneys' fees in the absence of congressional authorization for wanton, vexatious and oppressive action, as an exception to the traditional American rule [*Alyeska Pipeline Service Co. v. Wilderness Society*, 95 S.Ct. 1612 (1975)], against a sovereign state were never contemplated. If such a result is forth coming, does that mean that the states can similarly recover for those multitudinous §1983 lawsuits shown to be frivolous and merely filed in bad faith? No lesser position should be afforded the states if the result reached below is sanctioned by this court.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the _____ day of August, 1976, three copies of the foregoing Brief of Amicus Curiae, The State of Texas, were mailed by certified mail, return receipt requested, to each of the following persons: Seymour Moskowitz, Project Justice and Equality, 1109 N. Union Street, Gary, Indiana 46402; Lawrence Albrecht, 1322 S. 16th Street, Milwaukee, Wisconsin 53204; Ivan E. Bodensteiner & Wayne Defferding, Valparaiso University School of Law, Valparaiso, Indiana 46383; John P. Segovia, 800 Massachusetts Street, Gary, Indiana 46402; Donald Bowgard, 219 State House, Indianapolis, Indiana 46204.

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